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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC., DISSTON DIVISION—
DANVILLE WORKS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, and
UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
AS AMICUS CURIAE

1. Introduction

The Chamber previously filed a brief *amicus curiae*¹ in the instant case to present its views to the Court on the landmark question of labor law here presented: whether the National Labor Relations Board may compel agreement and force concessions as to the terms and conditions of collective bargaining agreements. The brief subsequently sub-

¹ The brief was filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

mitted by the Steelworkers Union acknowledges that this very issue—whether the Board has the power “to dictate terms of employment for the future” (Union Br., p. 42)—is in fact, the core question here involved. Elsewhere in its brief, and in the brief of the Board, however, other matters are raised which similarly have significant and far-reaching implications and warrant presentation of the Chamber’s views.

The Respondents thus assert that this case is an “exceptional” one where “the *only* way in which the employer can now demonstrate his good faith [or “purge itself of contempt”] is by giving the union what it seeks”; that a remedy is necessary which will enable “the Union to regain its strength . . .”; that a forced agreement is the only solution here available which “is reasonably calculated to restore the likely *status quo*”; and that, in these circumstances, “where consent to a particular proposal has been withheld solely for a bad faith reason”, then “the freedom of contract policy embodied in Section 8(d) is not contravened . . . by requiring acceptance of that proposal” (Bd. Br., pp. 11, 21-3, 25; Union Br., p. 37; emphasis added). The Union’s brief proceeds to take this argument one step further and suggests that the absence of any “legitimate and substantial business justifications” on the part of an employer for resisting a union demand should be the “appropriate touchstone” to “exact concessions and/or impos[e] agreement” (Union Br., p. 15).

This brief will be addressed to demonstrating why these novel and critical propositions are unsupported in fact and unfounded in law.

2. The Remedy Invoked Is Not the Only Means of Demonstrating Good Faith and Remedying the Company’s Refusal To Bargain

The Chamber’s previous brief assumed, *arguendo*, that the Board and court below properly regarded the H. K. Porter as a recalcitrant employer. It is important to note

that this characterization is, despite its utilization by the Respondents as a motif, open to serious question. The dissent below thus asserted that he had "seldom seen a record so barren of support for the decision [on the merits] of the examiner and the Board" (A. 78)—a position buttressed by the Company's *overall* good faith conduct;² the availability of other effective means, acceptable to the Union, apart from a checkoff, by which it could collect dues;³ the Board's defective underlying assumption that if

² See the Chamber's previous brief at fn. 4. Thus, as the dissent below observed, subsequent to the Board's initial order, *each* of the parties withdrew certain bargaining proposals; agreement was reached on eleven of the fourteen items then open; and the lack of complete agreement was the product not only of the resistance on the part of the Company to a checkoff provision but the equally-adamant insistence by the Union that any contract would have to contain such a term (A. 38-9, 68, 76-7). Moreover, following the Board's order in the instant case, and consistent therewith, the Company reached agreement with the Union on other matters far more critical to a collective bargaining relationship, and thus more susceptible of being used to forestall agreement, than a checkoff, i.e., wages and insurance (Union Br., p. 11; A. 85, 91-2). Ironically, it is this very willingness on the part of the Company to agree on all items except for a checkoff which the Board now invokes as the barrier to permitting the Company from seeking a reasonable concession as the *quid pro quo* for a checkoff (Bd. Br., p. 18).

³ Both the Board and the Union incorrectly assume that a checkoff was the *only* "feasible" procedure whereby the Union could obtain effective collection of dues (Bd. Br., p. 4; Union Br., p. 4). This contention ignores the existence of a Union mailing address in Danville (A. 45, 69), the financial justification for establishing an additional office if necessary (A. 69), the asserted availability under the Act of the Union's right to collect dues during non-working hours on non-working areas (A. 67, n. 18), and the Union's expressed willingness to accept alternative means of dues collection other than checkoff (A. 21, 25, 47). Since the Union was agreeable to such alternatives prior to the Board's order, and, in fact, proposed them to the Company, it cannot now be asserted that such alternatives would not be "feasible" and would create "an unsurmountable practical problem."

an employer does not have a "business" reason for declining to grant a checkoff, he must then necessarily be motivated by an unlawful desire to avoid reaching an agreement (Bd. Br., pp. 9-10), an assumption which disregards the numerous other lawful reasons which may have led to the employer's refusal;⁴ and the legitimacy, under the Act, of the Company's refusal "to aid and comfort the union".⁵

Even assuming, however, that the Company has been properly found to have bargained in bad faith, the Respondents seriously distort the basis for that finding. They assert that the *only* way that the Company can now demonstrate good faith is to grant a checkoff—nothing less will suffice—and that, as a result, the Chamber's suggestion that a contempt proceeding would be the appropriate and desirable vehicle to secure compliance with the Board order⁶ is merely an exercise in "formalism" (Bd. Br., pp. 17-8; Union Br., p. 37).

The Board's finding of bad faith, however, was not based on the premise that the refusal to agree on a checkoff clause was a *per se* violation of the Act; instead, it was expressly based "on the concatenation of the circumstances taken as a whole" (Bd. Br., p. 15; A. 123). And such "concatenation of circumstances" consisted, as the Board

⁴ See the Chamber's previous brief at fn. 5. See also the dissenting opinion of Mr. Chief Justice Burger (then Judge Burger) in *United Steelworkers v. NLRB (Roanoke Iron & Bridge Works, Inc.)*, 390 F.2d 846, 855-7 (D.C. Cir. 1967).

⁵ See Note, *Employer's Refusal to Bargain and the NLRB's Remedial Powers, The H. K. Porter Case*, 35 Univ. Chi. L. Rev. 771, 784 (1968).

⁶ The Chamber's previous brief also suggested various Board alternative remedies, in addition to the courts' contempt powers, that are more desirable means to cope with the problem of the recalcitrant employer than that adopted in the present case. Chamber Br., pp. 8-9 and n. 35.

examiner and the dissent below made clear, on three separate factors: (1) the anti-union demeanor of the Company's principal negotiator, Jones; (2) the explanation proffered by Jones for refusing to grant a checkoff, that he did not wish to give aid or comfort to the Union; and (3) the Company's position which tended to "disparage" or "discredit" the Union in the eyes of the employees (A. 49-51, 71-5). Presumably, therefore, the correction of any one or more of these factors would have been sufficient to purge the Company of bad faith—the Company could have replaced Jones with a negotiator who did not have an anti-union animus, as apparently it did (A. 83); it could have articulated reasons for refusing to grant a checkoff which were legitimate or, as it in fact did, suggest bargaining on mutually "convenient, effective, and satisfactory" alternatives (A. 89); or it could have engaged in conduct which indicated that it did not desire to disparage or discredit the Union, as it did when it reached an overall agreement with the Union apart from the checkoff controversy. In short, as the Board apparently believed when it concluded that the Company had complied with its order and that contempt proceedings were not warranted (A. 104-5, 111), there were several avenues for the Company to pursue to demonstrate its good faith and its desire to comply with the Board's order. Granting a checkoff provision was merely one, not the only, of these alternatives.

3. The Remedy Invoked Is Not Necessary To Restore the "Likely Status Quo" Nor Enable the Union "To Regain Its Strength"

The Board argues that a required concession in the instant case restores the "likely *status quo* since it is probable that, except for its illegal motive, [the Company] would have agreed to a checkoff provision here" (Bd. Br., pp. 18-19, 21). There is no demonstrable evidence, however, upon which this assumption is based. The mere fact that many contracts have such clauses "does not *ipso facto* make the checkoff issue insignificant. Ninety-six per cent of all

contracts provide for arbitration and 90 per cent for seniority, hardly trivial items.”⁷ And, in view of the Union’s willingness to accept any of several less onerous alternatives, it can surely be assumed that, if forced to make a choice, the Company would have opted for one of these methods of dues collection rather than a checkoff. The principal vice in the Board’s argument, however, is that it violates the fundamental precept of the Act that, while “the Board may properly order execution of a contract to which the parties have agreed, it may not order execution of a contract to which it thinks they should have agreed.”⁸ As Judge Friendly stated in *Cooper Thermometer v. NLRB*, 376 F. 2d 684, 690 (2nd Cir. 1967):

“A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress’ direction in Sec. 8(d) that the obligation to bargain does not compel either party ‘to agree to a proposal or require the making of a concession.’ ”

The Board’s contention that the remedy invoked is necessary to enable the Union “to regain its strength” and deprive “the Company of some of the advantage which it gained by unlawfully weakening the Union” (Bd. Br., pp. 21-3) is similarly specious. If the Union was weakened here, such weakness resulted solely from its inability to successfully strike to obtain a checkoff—a disparity of bargaining power which the Act was clearly not designed to

⁷ Note, *Employer’s Refusal to Bargain and the NLRB’s Remedial Powers, The H. K. Porter Case*, 35 Univ. Chi. L. Rev. 777, 784 (1968).

⁸ *Retail Clerks International Association v. NLRB*, 373 F.2d 660 (D.C. Cir. 1967) (footnotes omitted). Cf. *United Insurance Company v. NLRB*, 360 F.2d 823 (D.C. Cir. 1966).

equalize.⁹ This Court thus observed in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 490 (1960) that:

"... if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations".¹⁰

4. The Board's Order Contravenes the Freedom of Contract Policy Embodied in Section 8(d) of the Act

The Chamber's previous brief argued that as the Board's remedial powers under Section 10(c) are necessarily conditioned by the limitations which inhere in the basic policies of the Act, such powers may not be utilized in derogation of the express language of Section 8(d) which precludes the Board from compelling "either party to agree to a proposal or require the making of a concession" (Chamber Br., pp. 4-7). The Board's brief accepts, as it must, this fundamental proposition, but then urges that since "[n]othing in Section 8(d) permits a party to refuse to agree to a proposal for a reason which violates the statute . . . to compel acceptance of the proposal is not to force a concession in violation of Section 8(d)" (Bd. Br., pp. 24-5). The logic of this argument, however, is difficult to fathom. While Section 8(d) obviously does not confer

⁹ See Note, *Employer's Refusal to Bargain and the NLRB's Remedial Powers, The H. K. Porter Case*, 35 Chi. L. Rev. 777, 785-6 (1968). It should be noted that when the Union was able to mount a successful strike, it was able to achieve most of its objectives and presumably restore its stature in the eyes of the employees (Union Br., p. 11).

¹⁰ See also Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 Univ. Pa. L. Rev. 467, 474-7 (1964).

a right upon employers to utilize a bargaining position "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail," it most assuredly does permit employers to maintain positions "genuinely and sincerely held" regardless of whether they are founded on "either good or bad reasons, or no reason at all."¹¹

The Union seeks to overcome the clear intent of the prohibition language of Section 8(d) by arguing that "the Board frequently has fashioned remedies which interfere with the policy of 'freedom of contract' . . ." (Union Br., pp. 25-32). While it is no doubt true that there are some limited restrictions imposed by the Act on an absolute freedom of contract,¹² the authorities relied on by the Union clearly do not sanction the right of the Board to impose consent where no consent exists or dictate bargaining terms where the parties have not agreed to such terms. Indeed, each of the various categories of cases discussed by the Union are premised on the converse proposition of fostering voluntary collective agreements and compelling compliance with agreements freely entered:

- (1) a party may not, pursuant to the express requirements of Section 8(d), refuse to execute written contracts incorporating agreements already reached nor obviate such agreements by delaying through litigation such execution until after the contract period has run;¹³

¹¹ *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

¹² See Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 Univ. Pa. L. Rev. 467, 468 (1964). For example, the parties are not free, by virtue of Section 8(a)(3) and 8(e) of the Act, to contract in any way they wish about union security or "hot cargo" provisions.

¹³ E.g., *NLRB v. Warrensburg Board & Paper Corp.*, 340 F.2d 920 (2nd Cir. 1965).

- (2) a party may not seek to vitiate his voluntary agreement to participate in multi-employer bargaining by engaging in an untimely withdrawal from such a unit;¹⁴
- (3) an employer may not avoid his obligation to seek a good faith agreement with the statutory representative of his employees as to the terms and conditions of employment by unilaterally altering such terms and conditions;¹⁵
- (4) an employer may similarly not dissipate the good faith collective bargaining requirement by engaging in individual bargaining¹⁶ or bargaining with a union which has not been freely chosen by his employees as their representative;¹⁷ and
- (5) an employer may not seek to avoid the obligations of a bargaining agreement "reasonably related" to his business by exercising his prerogative "independently to rearrange [his] business and even eliminate [himself] as [an] employer."¹⁸

The Board should similarly not be permitted to erode the process of free and voluntary collective bargaining—as it seeks to do in the instant case—by establishing employment terms through government fiat.

¹⁴ E.g., *Universal Insulation Corp. v. NLRB*, 361 F.2d 406 (6th Cir. 1966).

¹⁵ E.g., *Fibreboard Paper Products Corp., v. NLRB*, 379 U.S. 203 (1964).

¹⁶ E.g., *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

¹⁷ E.g., *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943).

¹⁸ *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

5. The Existence of "Legitimate Business Justifications" Is an Irrelevant and Dangerous "Touchstone" in the Area of Remedying Refusals To Bargain

The Union suggests that unless an employer has an "legitimate and substantial business justifications" for resisting a union's demands, the Board may find a refusal to bargain which it may remedy "by exacting concessions and/or imposing agreement" (Union Br., p. 15). This dangerous proposition is premised on the erroneous assumption that bargaining tactics, such as withholding the grant of an item until a time when there is little else to offer or taking a bargaining position for "trading purposes",¹⁹ and the use of other economic weapons,²⁰ have no part to play in the bargaining process. It also ignores the fundamental precept that "deep conviction, firmly held and from which no withdrawal will be made . . . [is] both the right of the citizen and essential to our economic legal system, thus far maintained, of free collective bargaining."²¹ As Mr. Chief Justice Burger (then Judge Burger) stated with respect to a similar proposal:

" . . . once such rule is made, it is quite clear that the Board and the courts are immersed in the substantive terms of the collective bargaining contract. This is not their role and the Supreme Court has been quite clear on this point."²²

¹⁹ See *United Steelworkers v. NLRB (Roanoke Iron & Bridge Works, Inc.)*, 390 F.2d 846, 855-7 (D.C. Cir. 1967) (dissenting opinion).

²⁰ See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488-9 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965).

²¹ *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

²² *United Steelworkers v. NLRB (Roanoke Iron & Bridge Works, Inc.)*, 390 F.2d 846, 856 (D.C. Cir. 1967) (dissenting opinion; footnotes omitted).

6. Conclusion

For the above-stated reasons, as well as those set forth in the Chamber's prior brief, the decision of the court below should be reversed.

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